FILED

NO. 596

In the Supreme Court of the United States

OCTOBER TERM, 1939

TRADESMENS NATIONAL BANK OF OKLAHOMA CITY,
Appellant,
VERSUS
OKLAHOMA TAX COMMISSION,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA

BRIEF OF APPELLEE

F. M. DUDLEY,
Attorney for Appellee,
State Capitol Building,
Oklahoma City, Oklahoma.

A. L. HERR,
C. D. STINCHECUM,
Of Counsel,
State Capitol Building,
Oklahoma City, Oklahoma.

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BRIEF OF APPELLEE

PRELIMINARY STATEMENT

This is an action originally brought in the District Court of Oklahoma County, Oklahoma, by appellant, Tradesmens National Bank, against the Oklahoma Tax Commission to recover a tax assessed against it according to or measured by its net income, which tax it paid under protest. The tax was laid under Section 16, Article 6, Chapter 66, S. L. 1935.

The Act under which the tax was assessed was assailed on constitutional grounds, as set forth in appellant's brief. The trial court sustained the tax. The Supreme Court upon appeal affirmed its judgment. Appellant brings the case to this Court for review. *Tradesmens*

National Bank v. *Oklahoma Tax Commission*, 95 Pac. (2d) 121. See, also, *First National Bank of El Reno* v. *Oklahoma Tax Commission*, 185 Okla. 98, 90 Pac. (2d) 438.

ARGUMENT

(Emphasis ours.)

Appellant contends that the Act levying the tax is unconstitutional for the following reasons:

1. It impairs the obligation of a contract.

2. It discriminates against national banks and, therefore, violates the Fourteenth Amendment to the Constitution of the United States.

3. It levies a direct tax upon a governmental instrumentality and interferes with the power of Congress to borrow money on the credit of the United States and is, therefore, unconstitutional.

We shall discuss these propositions in their reverse order.

The tax herein assessed is authorized by Section 5219, U. S. Revised Statutes as amended. The assessment is, therefore, not invalid because laid against a Governmental instrumentality.

The tax in question was assessed in accordance with the provisions of Section 16, Article 6, Chapter 66, S. L. 1935. This section provides:

"(a) In lieu of the tax imposed by Section 6, every national banking association located or doing business within the limits of the State of Oklahoma, shall annually, pay to this State, a tax according to, or measured by, its net income, to be computed in the manner hereinafter provided, at the following rates upon the basis of its entire net income for the next preceding fiscal or calendar year:

"Six (6%) per centum of the amount of the net income as herein provided.

"(b) The State of Oklahoma is hereby adopting method numbered (4), authorized by Section 5219, U. S. Revised Statutes, as amended. The tax imposed by this Section shall be exclusive and in lieu of all taxes imposed by the State of Oklahoma, or any subdivision thereof, on the property of any association liable to tax hereunder; provided, that nothing in this Section shall be construed to exempt the real property of national banking associations from taxation to the same extent, according to its value, as other real property is taxed."

It is contended first that this section is invalid and unconstitutional because it assesses a direct tax against a governmental instrumentality. We concede that national banks are governmental instrumentalities. We also con-

cede that Congress has power and authority to control the manner in which the several states may tax such instrumentalities; and we also concede that no state can levy a tax against such instrumentalities except as authorized by Congress. We contend, however, that Section 5219, Revised Statutes of the United States, as amended, expressly authorizes the several states to levy a tax such as here involved.

The Act provides in part as follows (Title 12, Section 548, Federal Code Annotated):

"The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

"1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause.

"(b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such state coming into competition with the business of national banks; provided, that bonds, notes, or other evidence of indebtedness in the hands of individual citizens not employed or engaged in the banking or investment business and representing merely personal investments not made

in competition with such business, shall not be deemed moneyed capital within the meaning of this section.

"(c) In case of a tax on or according to or measured by the net income of an association, the taxing State may, except in case of a tax on net income, include the entire net income received from all sources, but the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon mercantile, manufacturing, and business corporations doing business within its limits; provided, however, that a State which imposes a tax on or according to or measured by the net income of, or a franchise or excise tax on, financial, mercantile, manufacturing, and business corporations organized under its own laws or laws of other States and also imposes a tax upon the income of individuals, may include in such individual income dividends from national banking associations located within the State on condition that it also includes dividends from domestic corporations and may likewise include dividends from national banking associations located without the State, on condition that it also includes dividends from foreign corporations, but at no higher rate than is imposed on dividends from such other corporations.

"(d) In case the dividends derived from the said shares are taxed, the tax shall not be at a greater rate than is assessed upon the net income from other moneyed capital."

It will be observed that under Section 16, *supra*, of the Oklahoma Income Tax Act, the State of Oklahoma elected to tax national banks in accordance with Method No. 4 authorized by Section 5219, U. S. Revised Statutes, *supra*. Since the Act of Congress has specifically authorized the

State to tax national banks in accordance with the method herein followed, it cannot be said that the State, in following such method, has levied a prohibited tax against a governmental instrumentality.

It has uniformly been held by this Court that a State, in levying an excise or privilege tax against corporations other than national corporations might constitutionally include in the measure thereof income derived from governmental securities.

It has been so held by the Supreme Court of the United States in the case of *Pacific Co., Ltd.*, v. *Johnson*, 285 U. S. 480. The gist of the decision is announced in the headnotes, as follows:

> "A California corporation acquired municipal bonds at a time when, by the State Constitution, they were declared to be 'free and exempt from taxation.' Subsequently, pursuant to a change in the Constitution, a statute subjected the corporation to a tax on the privilege of doing business in the State, measured by a specified percentage of its net income, in the computation of which the statute directed the inclusion of 'all interest received from federal, state, municipal or other bonds.' *Held* (assuming that the exemption was contractual and extended to the income derived from the bonds exempted):
>
> "1. That the tax immunity granted was not broad enough to secure freedom from taxation of the corporate franchise measured by the tax-exempt income, and therefore, the obligation of the bond contracts was not impaired by the tax. PP. 489-491.
>
> "2. In the absence of applicable state decisions antedating the alleged impairment of contract, the ex-

tent of the tax exemption is to be decided by the aid of generally accepted principles of construction. P. 489.

"3. Until the adoption of the constitutional amendment in 1928 (Sec. 16, Art. XIII), and of the Bank and Corporation Franchise Tax Act (Cal. Stats., Cal.) for taxing corporate franchises by the method here in question; and, until this case, no decision of any court of the State had determined whether the granted immunity extends to a tax on corporate franchises because tax-free income property is included in its measure. (p. 489.)

"4. On the other hand, long before adoption of the constitutional tax exemption, the distinction was well recognized between a tax on the privilege of exercising the corporate franchise and a tax on corporate property or income, even though the former was measured by the latter; and tax immunity of the property or income was not deemed to extend to the franchise (p. 489).

"5. Grants of immunity from taxation are strictly construed (p. 491).

"6. In as much as the tax exemption, as granted, did not extend to immunity from inclusion of the interest in the measure of a corporate franchise tax, and in as much as the State had power to use that measure in taxing the franchise, the fact that the legislature saw fit to include the interest on such bonds by express mention when its inclusion would otherwise have been implied in the general term net income, does not invalidate the tax, no discrimination being involved (pp. 491-495)."

In that case the State of California amended its constitution, providing for the levy of an excise tax on all corporations for the privilege of doing business in the State, and specifically included in the measure of the tax income derived from State, municipal and governmental securities. At the time this amendment was adopted, the California constitution specifically provided that State, municipal and government bonds should be exempted from taxation. It was first contended by the taxpayer in that case that the amendment of the constitution including in the measure of tax income derived from these sources was unconstitutional, as to bonds issued prior to the adoption of the amendment, in that such amendment impaired the obligation of the contract. It was further contended that even though the State was authorized to include in the measure the income derived from its own securities, it could not constitutionally include in the measure of such tax income derived from Federal Governmental securities.

After deciding the first proposition against the contention of the taxpayer, and in discussing the second proposition, the Court said:

> "The power of a state to levy a franchise tax measured by net property or income including tax-exempt bonds of the United States or their income was upheld by this Court in *Society for Savings* v. *Coite* (1868), 6 Wall. 594; *Provident Institution* v. *Massachusetts* (1868), 6 Wall. 611; *Home Insurance Co.* v. *New York* (1890), 134 U. S. 594. State laws taxing shareholders of national banks on the full net value of their shares, although the banks own tax-exempt federal securities,

have also been consistently upheld. *Van Allen* v. *Assessors*, 3 Wall. 573; *Peoples National Bank* v. *Board of Equalization*, 260 U. S. 702; *Des Moines National Bank* v. *Fairweather*, 263 U. S. 103; similarly Congress may impose a tax on state banks measured by the average amount of their deposits, although deposits of state funds by state officers are included. *Manhattan Co.* v. *Blake*, 148 U. S. 412. *The rule that a tax upon a franchise, measured by net income, including that from tax-immune property, is not an infringement of the immunity, was re-examined and affirmed in Flint* v. *Stone Tracy Co.*, 220 U. S. 107, *which was accepted as authority in Macallen Co.* v. *Massachusetts*, 279 U. S. 620, and followed in *Educational Films Corp.* v. *Ward*, 282 U. S. 379.

"This distinction, so often and consistently reaffirmed, is but a recognition that the franchise, the privilege of doing business in corporate form, which is a legitimate subject of taxation, does not cease to be such because it is exercised in the acquisition and enjoyment of non-taxables. The distinction is one of substance, not of form, and has been so recently discussed in Educational Films Corp. v. Ward that it need not be elaborated here. *It suffices to say that the tax immunity extended to property qua property does not embrace a special privilege, the corporate franchise, otherwise taxable, merely because the value of the corporate property or net income is included in an equitable measure of the enjoyment of the privilege. The owner may enjoy his exempt property free of tax, but if he asks and receives from the state the benefit of a taxable privilege as the implement of that enjoyment, he must bear the burden of the tax which the state exacts as its price.*"

The cases cited in this opinion amply sustain the authority of the State, independent of Congressional authority, to include in an excise or privilege tax interest derived from Governmental securities, as against all State corporations.

It is conceded that prior to the last amendment of Section 5219, *supra*, the State could not have legally levied a tax such as here involved. It will be noticed that Section 5219 has been amended at different times. The last amendment was in 1926. Prior to that amendment the several states were obliged to select one of three methods authorized by said section by which to tax national banks. Under the 1926 amendment the Congress authorized the states to select an additional method known as "Method No. 4" by which to tax national banks. That method authorizes the states to tax national banks according to or measured by their net income, and authorizes the states, in measuring such tax, to include therein income derived from *all* sources.

It is our contention that the sole purpose of Congress in enacting said amendment was to expressly authorize states electing to tax national banks according to or measured by their net income to include in the measure thereof income derived from governmental securities. We think this contention is borne out by the discussion which took place when this amendment was before Congress for consideration, in the Committee as a Whole for the House of

Representatives. At that time, according to the Congressional Record, the following discussion was had:

Mr. McFADDEN, House Member, in addressing the Committee on the Amendment, in part, said:

"Mr. Chairman, a brief word in regard to the purpose of this amendment. The purpose of this proposed amendment to Section 5219, Revised Statutes, is to enable states that have adopted income tax methods to abandon the ad valorem taxation of the shares of national banks and apply income tax methods to national banking associations within their limits, without thereby favoring national banks and their shareholders as compared with other corporations generally and their stockholders. In other words, to make it possible for income tax states to tax national banking associations and their shareholders on complete taxing parity with other corporations and their stockholders.

"Mr. Moore of Virginia:

"Will the gentleman yield?

"Mr. McFadden:

"Yes.

"Mr. Moore of Virginia:

"Will the gentleman explain exactly what the present law is before he comes to a discussion of this amendment?

Mr. McFadden:

"Yes. Section 5219, as enacted in 1864 and substantially down to 1923, provided only one method for the taxation of national banks by the states, to-wit: the inclusion of the shares in the valuation of the personal property of the owners or holders of such shares."

Then, after discussing the history of the amendment of the act providing for additional methods of assessing national banks, under Method No. 2 and Method No. 3, Mr. McFadden continues as follows:

"The purpose of this added fourth alternative method is fully explained as follows, in Report No. 526 accompanying H. R. No. 9958; In the states which now apply the net income tax method to corporations generally denominate it as excise or franchise tax, the practice is to include income from all sources, including income from tax exempt securities, in arriving at the measure based on the net income. *Therefore, it is desirable, in order to establish complete taxing parity, to remedy any question as to the inclusion of the income from tax-exempt securities as part of the measure of the tax based on the net income of national banking associations; so that the same basis of measuring the tax according to the net income from corporations generally may be applied to national banking associations by the taxing state.*"

Congressional, Record,
Vol. 167, Part 6,
Pages 6083-6084.

Mr. WINGO, in discussing the bill, said, in part:

"Mr. Chairman, I would not have said anything at all on this matter, except some gentlemen have asked me to state in the record what I have told them privately about this bill, there is but one change that is made in existed law by this bill and that is to give the states one additional method of taxation of national banks to what they already have under existing law. That is the only change that is made. * * * The additional legislation in this bill is of a liberalizing character, both

from the standpoint of liberality of the state taking off restrictions,—I used the word 'liberality' in that sense—and the further feature that it permits the states, if they wish, to adopt a more modern method of taxation.

"Mr. Briggs:

"Will the gentleman yield for a question?

"Mr. Wingo:

"Yes.

"Mr. Briggs:

"Can the gentleman give the House any idea of what additional taxes it is estimated will be raised by the states through taxation under the additional authority which the bill carries?

"Mr. Wingo:

"Not a cent, and possibly reduce it in New York. * * * Here is the disputed point, I will say to the gentleman from Texas, under existing law there are three ways by which the state of New York, or Texas, can tax national bank stock, they can either tax the stock directly or they can tax the income of the individual shareholders, including the income that comes from the shares of stock, or you can tax the income of the association. If you do one, you cannot do the other. In other words, there are three alternative methods. The bill retains every one of the alternative methods but moves further and says that a state, if it desires, may levy a tax—that is, *not an income tax in the direct sense of the word, but really an excise tax measured by the income. In other words, the amount of the excise tax or the franchise tax, or whatever you call it will be determined by the standard that is fixed by the volume of the income from all sources.*

"Mr. Hastings:

"And that will include the other methods.

"Mr Wingo:

"That makes for alternatives. * * * Let me show you what the effect is. Here is a bank with a capital stock say of one hundred thousand dollars ($100,000). *Suppose it had more than one hundred thousand dollars ($100,000) in tax-exempt securities and you can find banks like that, you can see where the factor of doubt comes in. We meet this situation in this bill by saying you may levy a tax upon the bank that is measured by the income, and when you do that you can take the income from whatever source you please.* The Supreme Court has rendered a decision which leaves in the mind of the proponents of this bill, they say, no doubt at all that under the language of the bill, if they undertake to fix the excise tax, or the franchise tax, if they word it so, that it is measured by the income of the banks, *they can include the income that comes from tax-exempt securities. This is the only change we make in the existing law.*

"Mr. Cooper, of Wisconsin:

"Will the gentleman yield?

"Mr. Wingo:

"Yes.

"Mr. Cooper, of Wisconsin:

"Does not that involve a contradiction of terms, if not of law?

"Mr. Wingo:

"At first blush, it looks like that it is true, but let me repeat what the decision is. It is not an income tax. You are going to put a tax on the corporation doing business, or its right to do business; you can call it whatever name you wish. You are going to

say, how can we arrive at a fair and equitable measure of what that tax should be in the case of each corporation? Naturally, the basic factor is the ability to pay, is it not? That is one of the basic factors in levying a tax. Now, the state may say, in order to determine what the amount of this particular tax shall be, we will use a standard that will determine its ability to pay, the amount it shall pay, shall be the standard fixed by the volume of its income. *It is not a tax on the income, it is a tax on the corporation for doing business and the amount is measured by a yardstick called the income and that includes all income because of the ability of the bank to pay.*

"Mr. Cooper, of Wisconsin:

"Will the gentleman again yield?

"Mr. Wingo:

"Certainly.

"Mr. Cooper, of Wisconsin:

"Is not that a use of words to conceal an idea? *You are fixing a measure which includes a tax on the income of tax-exempt securities and so you are taxing tax-exempt securities.* The language is not important but the idea is.

"Mr. Wingo:

"Does the gentleman think that is a bad idea?

"Mr. Cooper, of Wisconsin:

"I am not called upon to express an opinion.

"Mr. Wingo:

"I am not criticising the gentleman.

"Mr. Cooper, of Wisconsin:

"That is not germane to the point whether it is right or not. I made the point that it was a contradiction of terms in the argument of the gentleman in explaining

this bill. He said that you fixed the measure by the total revenue *and that includes the income tax-exempt securities. If you do fix it that way, you tax tax-exempt securities.*

"Mr. Wingo:

"I have to be candid with the gentleman. I confess that the decision of the Supreme Court which arrived at the same conclusion gave me a headache and it took me considerable time to be able to comprehend it. I am quite aware of my lack of ability to express it in a way that is really satisfactory to myself. My argument is crude, even though measured by my own concept of it. It is a difficult thing to express, but I think the gentleman will get at what I am driving at; *and if he will read the decision of the Court which is referred to in this report, he will see that they have done that.*"

Congressional Record,
Volume 167—p. 6085.

Mr. STEVENSON also discussed the bill, in part, as follows:

"Mr. Stevenson:

"Now what do we do by this bill? They come to us with this proposition; allow us to use the entire income of the bank as the yardstick upon which to measure the levy of a tax on the right to do business and the entire income includes income from tax exempt securities and those that are not exempt, * * * We have written that into the law, that is what this adds to the methods of taxation. * * *

"Mr. Cooper, of Wisconsin:

"Will the gentleman permit an interruption?

"Mr. Stevenson:

"Yes.

"Mr. Cooper of Wisconsin:

"If the total income of the bank is the measure, that includes the income of the bank from tax exempt securities.

"Mr. Stevenson:

"Yes, sir, it does.

"Mr. Cooper of Wisconsin:

"Then this is the beginning of the taxing of hitherto tax exempt securities.

"Mr. Stevenson:

"The Supreme Court of the United States has held in the case of *Flint* v. *The Stone Tracy Company*, 220 U. S. 108, that that can be done; *that it is not a tax on the exempts, but is a tax on the corporation for the privilege of doing business measured by its entire income and you can embrace that in it.*

"Mr. Cooper of Wisconsin:

"If the gentleman will permit, as I said a moment ago, it occurs to me that is simply using language to obscure an idea. *You can take the entire income of the bank, including that which it receives from tax exempt securities, as the measure.*

"Mr. Stevenson:

"Yes, sir, that is what you do.

"Mr. Cooper of Wisconsin:

"And then you proceed to tax that which includes income from tax-exempt securities.

"Mr. Stevenson:

"That is correct.

"Mr. Cooper of Wisconsin:

"And the use of the word 'franchise' does not obscure it of the fact that you are attempting to tax and do tax hitherto tax-exempt securities.

"Mr. Stevenson:

"That is correct, and I am glad to hear a gentleman of such standing in this House as well as in the country, state what we all know that the Supreme Court of the United States frequently obscures ideas by language, as well as Statesmen when they are on the stump. *That is correct, but this is not the first time that it has been done. When they held that the stock was taxable although every dollar of it was invested in United States Bonds, which were expressly exempt from taxation, they held practically the same thing.*"

Congressional Record,
Vol. 167—p. 6088.

The above discussion, when the amendment here involved was before Congress, sustains our contention that the amendment was enacted for the sole purpose of permitting the states, when assessing national banks according to or measured by net income, to include in the measure of such tax income derived from governmental securities.

The tax assessed under the Act in question, as pointed out in the above discussion, is not an income tax, but is in the nature of a privilege tax assessed against national banks for the privilege of transacting business within the State of Oklahoma. Since the tax assessed was specifically authorized by Congress, it cannot be said that the assessment is invalid as being a prohibited tax against a govern-

mental instrumentality or as interfering with the power of Congress to borrow money on the credit of the United States.

The assessment as laid does not discriminate against national banks; it does not violate the Fourteenth Amendment to the Constitution of the United States.

It is contended by appellant that the assessment discriminates against national banks for the reason that the rate imposed on national banks, under the section in question, is a higher rate than assessed upon other financial corporations and higher than the highest of the rates assessed against mercantile, manufacturing and business corporations doing business within the State.

This contention is based upon the proposition that in assessing ad valorem taxes or income taxes against mercantile establishments and financial corporations, other than state banks, doing business in this State, such corporations are exempt from taxation upon governmental instrumentalities, and the income therefrom is exempt from taxation under the Income Tax Laws of the State. There is no contention that the Act discriminates in favor of state banks, nor can such contention be made, as Section 17 of the Act provides, in part:

"(a) In lieu of the tax imposed by Section Six, every bank or trust company organized under the banking laws of this State or Morris Plan Company, shall annually pay to this State for the privilege of doing business within its limits, a tax, according to, or measured

by, its net income, to be computed in the manner hereinafter provided, at the following rates upon the basis of its entire net income for the next preceding fiscal or calendar year:

"(1) Six (6%) per centum of the amount of net income as herein provided.

"(b) The tax imposed by this Section shall be exclusive and in lieu of taxes on the shares of stock or personal property of any such bank or trust company or Morris Plan Company subject to taxation under this Section, except organization fees and taxes imposed by the banking laws in the case of banks or trust companies, and except organization fees and corporation license fees in the case of Morris Plan Companies. Nothing in this Section shall be construed to exempt the real property of any such taxpayer from taxation to the same extent, according to its value, as other real property is taxed."

It is our contention that the word "rate," used in the Act of Congress above mentioned, refers to the entire burden of taxation and when so considered it cannot be said that the Act, on its face, discriminates in favor of mercantile and other financial corporations and against national banks. While it is true that such concerns are not taxable, under the Income Tax Act, upon interest derived from governmental securities, these corporations, in addition to paying an income tax, are assessed a privilege tax at the rate of One Dollar ($1.00) per Thousand upon the value of their capital stock employed in the State, and are also assessed ad valorem tax. (See stipulation, Tr. 26.)

These corporations are all assessed an income tax at a rate of six (6%) per centum upon their net income, and when this method of taxation is taken into consideration, in addition to the franchise and ad valorem tax rate assessed against them, it cannot be said that they are assessed at a lesser rate than national and state banks are assessed.

The Act of Congress does not provide that the State must adopt the same measure of taxation against mercantile and other financial corporations, in order to employ Method Number 4 authorized by Congress in assessing national banks. It is not required that the same system of taxation be employed as to mercantile and other financial corporations.

In effect, it only provides that no greater burden of taxation shall be assessed against national banks than is assessed against such other corporations.

We think this proposition is sustained by the following authorities: *Mercantile Bank* v. *New York*, 121 U. S. 138. It is there said:

"The mode of taxation adopted by the State of New York in reference to its corporations, excluding trust companies and savings banks, does not operate in such a way as to make the tax assessed upon shares of national banks at a greater rate than that imposed upon other moneyed capital in the hands of individual citizens.

"Although trust companies created under the laws of New York are not banks in the commercial sense of the word, shares in such companies are moneyed capital in

the hands of individuals; but as these companies are taxed upon the value of their capital stock, with deductions on account of property in which it is invested either otherwise taxed or not taxable, and are additionally taxed upon their income by way of franchise tax, it does not appear that the rate of taxation thus imposed by the laws of New York is less than that upon shares in national banks."

In the case of *Covington* v. *First National Bank*, 198 U. S. 101, the following rule is announced in the last paragraph of the headnotes:

"A difference in methods in assessing shares of national banks from that of taxing state banks does not necessarily amount to a discrimination, rendering the act invalid under Sec. 5219, and justify the judicial interference of courts for the protection of the shareholder, unless it appears that the difference in method actually results in imposing a greater burden on the national banks than is imposed on other moneyed capital in the State."

In that case, in the State of Kentucky national banks were assessed upon the shares to the stockholders. State banks were assessed upon the franchise of such banks and not upon the shares of stock. It was contended by the bank in that case that the different method of assessing state banks was a discrimination against national banks and that the Act was, therefore, void. The Court held against the contention and, in so doing, said:

"As to the alleged discrimination against shareholders in national banks because the assessment of the property of state banks is upon the franchise and not upon the shares of stock, there is nothing in the bill to show that

this difference in method operates to discriminate against national bank shareholders by assessing their property at higher rates than are imposed upon capital invested in state banks. And as to the deduction of the value of real estate and other deductions allowed to state banks, the Supreme Court of Kentucky has held that all deductions allowed to state banks must be allowed in like manner in assessing the property of shareholders in national banks. *Commonwealth* v. *Citizens' Bk.*, 80 S. W. Rep. 158. Nor does the allegation that in cities of the first, second and third class state banks are assessed upon their shares for city taxation, but upon their franchise and property for state and county taxation, in the absence of averments of fact showing that thereby a heavier burden of taxation is imposed upon national than state banks in such cities, warrant judicial interference for the protection of shareholders in national banks. *Davenport Bank* v. *Davenport Bd. of Equalization*, 123 U. S. 83.

"Judgment affirmed."

In the case of *Davenport Bank* v. *Davenport Board of Equalization*, 123 U. S. 83, the following rule is announced:

"Section 5219, Rev. Stat., respecting the taxation of national banks, does not require perfect equality between state and national banks, but only that the system of taxation in a State shall not work a discrimination favorable to its own citizens and corporations and unfavorable to holders of shares in national banks.

"If a state statute creating a system of taxation does not on its face discriminate against national banks, and there is neither evidence of a legislative intent to make such discrimination, nor proof that the statute works an actual and material discrimination, there is no case for holding it to be unconstitutional."

In that case, under the laws of Iowa, stockholders in national banks were assessed upon the shares of stock held by them. State banks were assessed upon their moneyed capital. It was contended that this was a discrimination against national banks. Discussing this proposition, the Court said:

"It has never been held by this court that the States should abandon systems of taxation of their own banks, or of money in the hands of their other corporations, which they may think the most wise and efficient modes of taxing their own corporate organizations, in order to make that taxation conform to the system of taxing the national banks upon the shares of their stock in the hands of their owners. All that has ever been held to be necessary is, *that the system of state taxation of its own citizens, of its own banks, and of its own corporations shall not work a discrimination unfavorable to the holders of the shares of the national banks.* Nor does the Act of Congress require anything more than this: neither its language nor its purpose can be construed to go any further. Within these limits, the manner of assessing and collecting all taxes by the States is uncontrolled by the Act of Congress."

In the case of *Amoskeag Savings Bank* v. *Purdy*, 231 U. S. 373, the following rule is announced in the headnotes:

"The provisions in the tax law of New York, chap. 62, Laws of 1909, imposing a flat rate on shares of all banks, both state and national, without the right of exemption in case of indebtedness of the owners, does not discriminate against national banks and is not invalid under Sec. 5219, Rev. Stat. *People* v. *Weaver*, 100 U. S. 539, distinguished.

"*Mercantile Bank* v. *New York*, 121 U. S. 138, followed as to what constitutes moneyed capital within the meaning of Sec. 5219, Rev. Stat.

"*The State is not obliged to apply the same system to the taxation of national banks that it uses in the taxation of other property, provided no injustice, inequality or unfriendly discrimination is inflicted upon them. Bridgeport Savings Bank* v. *Feitner*, 191 N. Y. 88, approved."

In that case the state and national banks were assessed against the stockholders on their shares of stock. Trust companies and savings banks were assessed upon their moneyed capital and were permitted to deduct indebtedness from the net value, and were also assessed franchise tax. Other individuals and individual bankers and corporations were assessed ad valorem tax, but were permitted to deduct from the fair cash value of their property their individual debts. They were assessed ad valorem tax at a greater rate than national and state banks were assessed. It was not seriously contended in that case that there was a discrimination between banks and trust companies, but it was contended that there was a discrimination against other moneyed capital not invested in banking business, for the reason that the indebtedness of a taxpayer, having invested such capital, was permitted as a deduction from the value of such capital.

The Supreme Court held that there was no discrimination and, in so doing, said:

"Respecting other moneyed capital, trust companies, by Sec. 188, are subjected to an annual franchise tax

'equal to one per centum on the amount of its capital stock, surplus and undivided profits.' The practical burden of such a tax (which of course falls eventually upon the stockholder) is presumably not materially different from the burden of a tax at the same rate imposed upon the individual stockholder on a valuation of his shares arrived at by taking into consideration the same elements of capital stock, surplus, and undivided profits. And of course the stockholder has no relief from such a franchise tax because of his individual debts. By Sec. 189, savings banks are subjected to a franchise of one per centum on the par value of the surplus and undivided earnings. These institutions are thus apparently taxed upon the basis of what they possess over and above what they owe to their depositors. The individual banker by Sections 14 to 25, is taxed at the place where his business is located upon the 'amount of capital invested in his banking business.'

"It is not insisted that this tax law discriminates against national banks or the stockholders thereof as compared particularly with individual bankers, trust companies, or savings banks. The ground of complaint is that Section 24, in providing that owners of bank stock (state or national) shall not be entitled to deduction from the taxable value of their shares because of their personal indebtedness, is contrary to the restriction contained in Sec. 5219, Rev. Stat., that the shares of national banks shall not be taxed 'at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State,' because under Section 21 of the Tax Law all persons are permitted to deduct their debts from their other taxable personal property in general, including, as is claimed, other moneyed capital.

"Plaintiff in error relies chiefly upon the decision of this court in *People* v. *Weaver*, 100 U. S. 539. That

case was in effect a review of the decision of the Court of Appeals of New York in *People* v. *Dolan,* 36 N. Y. 59. The question was as to the validity of an assessment and taxation of national bank shares in the City of Albany under the state law of April 23, 1866 (N. Y. Laws 1866, p. 1647), without deduction because of the indebtedness of the taxpayer, in view of the fact that under other laws the owners of other kinds of personal property were entitled to have the amount of their debts deducted from the valuation for the purposes of taxation. The state court in the Dolan case had justified the method adopted in taxing the bank shares, upon reasoning that assumed 'that while Congress limited the state authorities in reference to the ratio or percentage levied on the value of its shares, which could not be greater than on other moneyed capital invested in the State, it left the matter of the relative valuation of the shares and of other moneyed capital wholly to the control of state regulation.' This court held that the clause in Sec. 5219,—'that the taxation shall not be at a greater rate than is assessed upon other moneyed capital,' etc., meant that the taxation upon shares should not be greater than on other moneyed capital, taking into consideration both the rate of assessment and the valuation. In other words, that the restriction contained in the Act of Congress had to do with the actual incidence and *practical burden of the tax upon the taxpayer.*

* * * * * * * * * *

"* * * As already shown, moneyed captial is dealt with for the purpose of taxation upon lines different from those upon which the taxation of other personal property proceeds. By Sections 13 and 24 state bank shares and national bank shares are both dealt with, and they are treated alike, being assessed not upon the basis of market values, but upon a valuation determined by a consideration of the capital stock, surplus,

and undivided profits (yielding what is commonly known as 'book value') and leaving out of consideration other elements, such as good will and the like, which enter into the determination of the actual market value of such shares. On the other hand, personal property in general is by Section 21 to be assessed at its full value, which presumably means market value. Section 24, instead of subjecting the owners of bank shares to taxation at the rate locally obtaining for other personal property, imposes a 'flat rate' of one per centum upon the valuation, with the proviso, as held in the Feitner case, *supra*, that if the local rate be less than one per centum, the owners of shares in the bank have the benefit of it.

"Enough has been said to show that the decision in the Weaver case, which had to do with a tax assessed upon bank stock on the basis of the same method of valuation and the same rate of assessment as personal property in general including other moneyed capital, but without allowance for the indebtedness of the taxpayer, although such allowance was made to the owners of personal property in general, including other moneyed capital, is not to be deemed conclusive upon the present controversy, in view of the difference in the taxing laws.

* * * * * * * * *

"According to this practical test, it seems to us that the scheme adopted by the State of New York for taxing shares in national banks cannot upon this record be denounced as violative of the limitations prescribed by Section 5219, Revised Statutes. The holders of shares in state banks are subjected to precisely the same taxation, and with respect to other competitive institutions, such as trust companies, the franchise taxes imposed upon them apparently result in a substantially similar burden upon the shareholder. Nor is there any discrimination in favor of savings banks. With respect

to individual bankers, there is a difference, they being apparently subject to the local rate of taxation and entitled to the privilege of deduction for personal debts; but as they are taxable upon the amount of capital invested in the banking business, which is normally only such as remains after the deduction of debts, it is not plain that they possess any valuable privilege of reducing the tax assessment by deducting debts. Foreign bankers are separately treated, for reasons sufficiently obvious; but no criticism is made of this. If there be other forms of 'moneyed capital in the hands of individual citizens' of the State employed in a banking or quasi-banking business in competition with the national banks, and which are subjected to a more favorable rule of taxation, our attention is not called to them. Moreover, we agree with what was said by the Court of Appeals of New York in the *Feitner* case, 191 N. Y. 88, 96, that 'The State is obliged to apply the same system to the taxation of other property, provided no injustice, inequality or unfriendly discrimination is inflicted upon them.' The court there took note of the fact that the flat rate of one per centum assessed upon national bank shares was more favorable to the relator than the general tax rate for the same year in the Borough of Manhattan, where the banks were located. The local rate (for the year 1901) was 2.31733 per centum. In the present case it is stipulated that the general tax rate locally applicable for the year 1908 to personal property not including bank shares, was 1.61407 per centum. There are other considerations to be weighed in determining the actual burden of the tax, one of which is the mode of valuing bank shares—by adopting 'book values' —which may be more or less favorable than the method adopted in valuing other kinds of personal property. As against the owner of bank shares who, by alleging discrimination, assumes the burden of proving it, and

who fails to show that the method of valuation is unfavorable to him, it may be assumed to be advantageous.

"Plaintiff in error contends that the statement of the New York court that 'When all things are considered, the rate, even without the privilege of deducting debts, is not greater than that applied to other moneyed capital in the hands of individual citizens of the state,' is based upon no facts of experience or investigation, and amounts to a pure surmise. We do not think it is to be so lightly treated; but, if it were, it still remains to be said that it was incumbent upon plaintiff in error to show affirmatively that the New York taxation system discriminates in fact against the holders of shares in the national banks, before calling upon the courts to overthrow it; and no such showing has been made.

"Nor can we say that the taxing scheme contravenes the limits prescribed by Section 5219, Rev. Stat., merely because in individual cases it may result that an owner of shares of national bank stock, who is indebted, may sustain a heavier tax than another, likewise indebted, who has invested his money otherwise. Such is, in effect, the objection urged by plaintiff in error to the position taken by the Court of Appeals of New York. In other words, it is insisted that Section 5219 deals with the burden of tax upon the individual shareholders, rather than upon shareholders as a class. We think this argument is sufficiently answered by reference to the language of Section 5219. The declaration is that 'the taxation shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State.' And this restriction is imposed upon a grant of authority to tax 'all the shares of National banking associations located within the state.' The language clearly prohibits discrimination against shareholders in national banks, and in favor of the shareholders of competing institutions, *but it does not*

require that the scheme of taxation shall be so arranged that the burden shall fall upon each and every shareholder alike, without distinction arising from circumstances personal to the individual.

"Judgment affirmed."

See, also, the following citation:

" 'Merely because a state statute does not provide for the taxation of shares in a corporation other than a bank, it does not follow that the shareholders of national banks are being discriminated against.' *Palmer* v. *McMahon* (1890), 193 U. S. 660, 33 L. ed. 772, 10 Sup. Ct. 324."

It is also contended by appellant that the assessment in this case is void for the reason that it is assessed at a greater rate than is other moneyed capital in the hands of individual citizens coming into competition with national banks. We do not think this contention sound. The Act of Congress authorizing states to adopt Method Number 4 in assessing national banks does not provide that the rate of assessment under such method shall be at no greater rate than other moneyed capital is assessed in the hands of individual citizens coming into competition with national banks. It simply provides that the rate of assessment should not be greater than the rate assessed against other financial corporations, and not greater than the highest rate assessed against mercantile corporations doing business within the state.

We know of no financial corporations operating in this State in competition with national banks, which it can be

said are assessed at a lesser rate than national banks. By express provision of the statute all financial corporations are required, under the Income Tax Act, to include in their gross income interest derived from Governmental securities.

Subdivision (c) of Section 7, Article 6, Chapter 66, S. L. 1935, in speaking of what shall be included in gross income, provides:

"In the cases of national banking associations, state banks, trust companies and other financial corporations, doing business in or organized under the laws of this State, the term 'gross income' includes the items of income enumerated in Section 18."

Subdivision (b) of Section 18 provides:

"The term 'gross income' shall also include the interest upon the obligations of the United States, or its possessions, or upon securities issued under the authority of an Act of Congress, the income from which is tax free."

It is clear from these provisions of the Act that state banks, and all other financial corporations are assessed by the same method and at the same rate. The statute does not therefore, discriminate in favor of other financial corporations and against national banks. All are assessed alike. The assessment against national banks is made by direct Congressional consent and in giving such consent, it did not require that the State conform its general system of taxation to the method authorized in assessing national banks. It did not require that the State abandon its In-

come Tax Law, under which law Congress well knew that the State could not levy a tax on interest derived from Governmental securities. When Congress provided that the assessment against national banks should not be at a greater rate than is imposed by the State on other financial corporations, it meant that the rate should not be greater than is applied to such property which the State was authorized to tax.

We think this contention is sustained by the case of *Des Moines National Bank* v. *Fairweather*, 263 U. S. 103. The gist of the decision is stated in paragraphs 4, 5 and 6 of the headnotes, as follows:

"4. In assessing shares in a national bank for taxation to the shareholders, no deduction need be made on account of securities of the United States, exempt from state taxation, which are part of the assets of the bank by which the value of the shares is measured, since the shares are property of the shareholders, distinct from the corporate assets. P. 112. *Bank of California* v. *Richardson*, 248 U. S. 476, distinguished.

"5. The restriction that taxation of national bank shares 'shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens' of the State (Rev. Stats., Sec. 5219) is to prevent discrimination against national banks in favor of state institutions or individuals engaged in similar business or investments, and applies to rules of valuation as well as to tax percentages. P. 116.

"6. This restriction, however, is not violated when the State, perforce, deducts tax-exempt securities of the United States in assessing capital employed in private banking, while taxing (as the Act of Congress allows)

the value of the shares of national banks without allowance for such tax-exempt securities owned by such banks. *Id.*"

The facts in that case were that the State of Iowa, in assessing national banks, made assessment on the individual stockholders on the value of their shares of stock. No deduction was allowed from the value of these shares on account of investments made by the bank in Governmental securities. In assessing the capital employed in private banking, that part of the capital invested in tax-exempt securities of the United States was allowed to be deducted. This, it was contended by the bank, constituted discrimination. In discussing this question, the Court said:

"The contention that the state statute subjects shares in a national bank to a higher rate of taxation than is laid on other moneyed capital in the hands of individual citizens is rested on the fact that in assessing capital employed in private banking the part invested in tax-exempt securities of the United States is deducted, while in assessing national bank shares the bank's investment in such securities is not deducted.

"The provision found in the congressional assent, that the taxation of the shares 'shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State,' has been considered by this court so many times that its purpose and meaning have come to be pretty well understood. Its main purpose is to render it impossible for the State, in levying such a tax, to create and foster an unequal and unfriendly competition, by favoring institutions or individuals carrying on a business similar to that of

national banks or engaging in operations and investments of a like character; and the restriction comprehends a discrimination effected through rules for fixing valuations quite as much as one effected by using different percentages in computing taxes on fixed valuations. *People* v. *Weaver*, 100 U. S. 539, 545; *Mercantile Nat'l Bank* v. *New York*, 121 U. S. 138, 155; *Amoskeag Sav. Bank* v. *Purdy*, 231 U. S. 373, 385.

"Our concern here is not with a voluntary refusal or intentional omission on the part of the State to tax other moneyed capital of citizens as it taxes national bank shares, *but with a submission by the State to superior laws of the United States exempting a part of the other moneyed capital from state taxation. It may be helpful to state the matter in another way. National bank shares are taxable,—made so by the congressional assent. That much or little of the bank's assets consists of tax-exempt securities of the United States does not affect the taxability of the shares,—they being distinct from the corporate assets. The State taxes such shares without regard to the exempt government securities held by the bank. The capital of private bankers is taxable, save the part invested in exempt government securities. The state taxes all of that capital, save the exempt securities. They are exempt because the United States makes them so, and the State merely respects the exemption.* In what is thus done does the State discriminate against national bank shares and in favor of other moneyed capital in the sense of the restriction? The question is not new; nor can it be regarded as an open one in this court.

"In *People* v. *Commissioners*, 4 Wall. 244, the question was whether, in the presence of the restriction, a State could assess and tax to their owners shares in national banks without making any deduction on account of tax-

exempt securities of the United States held by the banks, when in taxing moneyed capital of individuals employed in competition with those banks such a deduction was made. The court gave an affirmative answer to the question, saying, p. 256:

"'The answer is, that upon a true construction of this clause of the act, the meaning and intent of the law-makers were that the rate of taxation of the shares should be the same, or not greater, *than upon the moneyed capital of the individual citizen which is subject or liable to taxation. That is, no greater proportion or percentage of the tax in the valuation of the shares should be levied than upon other moneyed capital in the hands of the citizens.*

"'This rule seems to be as effectual a test to prevent unjust discrimination against the shareholders as could well be devised. It embraces a class which constitutes the body politic of the State, who make its laws and provide for its taxes. They can not be greater than the citizens impose upon themselves. It is known as sound policy that, in every well-regulated and enlightened state or government, certain descriptions of property, and also certain institutions—such as churches, hospitals, academies, cemeteries, and the like—are exempt from taxation; but these exemptions have never been regarded as disturbing the rates of taxation, even where the fundamental law had ordained that it should be uniform.

"'*The objection is a singular one. At the time Congress enacted this rule as a limitation against discrimination, it was well known to that body that these securities in the hands of the citizen were exempt from taxation.* It had been so held by this court, and, for abundant caution, had passed into a law.

"'The argument founded on the objection, if it proves anything, proves that these securities should have been taxed in the hands of individuals to equalize the taxation; and, hence, that Congress by this clause in the proviso intended to subject them, as thus situated, to taxation; and, therefore, there was error in the deduction. *This we do not suppose is claimed. But if this is not the result of the argument, then, the other conclusion from it is, that Congress required that the commissioners should deduct the securities, and at the same time intended the deduction, if made, should operate as a violation of the rate of the tax prescribed. We dissent from both conclusions.*'"

And in the case of *Mercantile Bank* v. *New York*, 121 U. S. 149, speaking on the same question, the Court said:

"* * * In reference to this supposed inequality the court said: 'The answer is, that, upon a true construction of this clause of the act, the meaning and intent of the law-makers were, that the rate of taxation of the shares should be the same or not greater than upon the moneyed capital of the individual citizen, which is, *subject or liable to taxation.* That is, no greater proportion or percentage of tax in the valuation of the shares should be levied than *upon other moneyed taxable capital* in the hands of the citizens. This rule seems to be as effectual a test to prevent unjust discrimination against the shareholders as could well be devised. It embraces a class which constitutes the body politic of the State, who makes its laws and provides for its taxes. They cannot be greater than the citizens impose upon themselves. It is known as sound policy that in every well-regulated and enlightened state or government, certain descriptions of property and also certain institutions, —such as churches, hospitals, academies, cemeteries,

and the like,—are exempt from taxation; but these exemptions have never been regarded as disturbing the rates of taxation, even where the fundamental law had ordained that it should be uniform' (p. 256). *The court then proceeded to show that the exclusion, as the subject of taxation of government securities held by individuals, from their moneyed capital, was by authority of the United States, and hence it would be a contradiction to infer that Congress meant to include the same government securities as a part of that moneyed capital which it required to be taxed by the states at a rate equal to that imposed by the latter upon the shares held by individuals of national bank stock.*

"The other objections taken to the validity of the tax complained of was, that insurance companies created under the laws of the state were authorized to deduct from the amount of their capital and surplus profits, for purposes of taxation, such part as was invested in United States securities. In reference to this the court said: 'The answer is, that this clause does not refer to the rate of assessments upon insurance companies as a test by which to prevent discrimination against the shares; that is, confined to the rate of assessments upon moneyed capital in the hands of individual citizens. These institutions are not within the words or the contemplation of Congress; but even if they were, the answer we have already given to the deduction of these securities in the assessment of the property of individual citizens is equally applicable to them.' (p. 257)"

In the case of *Hoenig* v. *Huntington National Bank of Columbus*, 59 Fed. (2d) 479, in the headnotes thereof, it is said:

"1. Tax on shares of national bank cannot be held invalid because of discrimination in favor of other moneyed capital unless similarity of investment use is shown (12 U. S. C. A., Sec. 548).

"2. Building and loan associations held not in 'competition with national banks' so as to invalidate local taxes on bank stock on ground of discrimination in favor of building and loan associations (12 U. S. C. A., Sec. 548).

"Moneyed capital invested by building and loan association should not be held to come in competition with moneyed capital in national banks within Rev. Stat., Sec. 5219, as amended (12 U. S. C. A., Sec. 548), prohibiting discrimination against national banks in taxation, since loans of building and loan and (*sic*) association, as distinguished from those of national bank are of amortized type, and answer need which banks cannot satisfy.

"3. 'Competition' within statute prohibiting discriminatory taxation against national bank shares is limited to employment of moneyed capital substantially as in loan and investment features of banking, and does not apply to competition for deposits (12 U. S. C. A., Sec. 548).

"4. Finance and mortgage companies held not in 'competition with national banks' so as to invalidate local taxes on national bank shares on ground of discrimination (12 U. S. C. A., Sec. 548).

"Finance and mortgage companies should not be held to use moneyed capital in competition with moneyed capital in national banks, within Rev. St., Sec. 5219, as amended (12 U. S. C. A., Sec. 548*), since finance and mortgage companies are outgrowth of need created largely by installment selling, and not satis-

fied by national banks, and since mortgage companies engaged in procuring mortgages for insurance companies or other financial institutions not competing with national banks are acting as agencies of such other institutions.

"5. That mortgage and finance companies are permitted to deduct value of their holdings of nontaxables in making return for taxation held immaterial as showing discrimination against national banks, since competition was lacking (12 U. S. C. A., Sec. 548)."

Certiorari in the above case was denied by the United States Supreme Court, 287 U. S. 648.

The same conclusion was reached by the Supreme Court of the United States in the case of *First National Bank of Shreveport* v. *Louisiana Tax Commission*, 289 U. S. 60, in the headnotes, as follows:

"2. A state law taxing all the property of banks that make loans mainly from money of depositors, but exempting other competing moneyed capital employed in making loans mainly from money supplied otherwise than by deposits, is consistent with the equal protection clause of the Fourteenth Amendment. P. 63.

"3. To avoid a state tax on national shares under R. S., Sec. 5219, it is necessary to prove not only that the bank was authorized to engage in, but that, during the tax year, its moneys were actually and in substantial amount employed in, some line of business which was then being carried on also by other and less heavily taxed moneyed capital. So held where there was no reason to suppose that national banks were prevented from competing by the tax discrimination. P. 64.

"4. The evidence in this case does not prove that the complaining national banks were engaged in lending money on real estate mortgages, or were in competition with 'small loan' companies, so-called Morris Plan and Morgan Plan companies, or automobile finance companies, in the making of small loans and the financing of purchases of automobiles and household goods. P. 65. 175 La. 119, 142 So. 23, 28 affirmed."

In considering the question of discrimination, we call the Court's attention to the stipulation of facts (Tr. 26) wherein it is stipulated in substance that six thousand business and mercantile corporations filed corporation license tax returns for the year 1936 in the State of Oklahoma, and that only thirty-seven of said corporations owned government bonds. There is also attached to said stipulation a table, marked "Exhibit-A" (Tr. 38) showing the license tax paid by such corporations during that year; also the amount of interest received on government bonds held by them, and the amount of income tax they would have paid on such interest had they been assessed on such interest at six per cent (6%) under the Income Tax Law. This table shows that in practically every instance corporations holding government bonds paid a greater corporation license tax than they would have paid had they been assessed six per cent (6%) on the interest derived from said bonds. Under this showing it will be seen that such corporations paid a greater tax to the State of Oklahoma than they would have paid had they been assessed in accordance with the method under which national banks are assessed, and by such method only.

In addition to this, the stipulation also shows that such corporations paid an ad valorem tax on their moneyed capital. It will, therefore, be seen that such corporations paid a much greater tax than they would have paid had they been assessed in the same manner as are national banks. National banks, therefore, cannot complain.

The above authorities amply sustain our contention that the assessment here involved in no manner discriminates against national banks.

Counsel for appellant, in order to sustain their contention that the act under consideration discriminates against national banks and unlawfully assesses tax against governmental instrumentalities, rely mainly upon the case of *Macallen* v. *Massachusetts,* 279 U. S. 620. In that case the Court held that the Act of the Massachusetts Legislature, amending its franchise tax statute in which amendment it specifically included in the measure of the tax income derived from muncipal, state and governmental securities, was void. Prior to the amendment, the Franchise Tax Act expressly excluded from the measure of the tax, and expressly exempted therefrom interest derived from such securities. The Court held the Act unconstitutional for the reason, as stated by the Court, the Act showed upon its face that the amendment was made for the sole purpose of reaching governmental securities and was, for this reason, void. The Court, however, in that case recognized the general rule to be as herein stated.

In that case Massachusetts amended its statute taxing national banks, and in the amendment adopted Method

No. 4 authorized by Congress, and included in the measure of the tax income derived from governmental securities. In order to equalize taxation and to make the rate as against other corporations correspond with the rate assessed against national banks, it amended its statute. The Court held the amendment bad for the reason that under its prior statute, the State of Massachusetts specifically exempted interest derived from these bonds from the measure of the tax. Disposing of the question, the Court said:

> "It has been suggested that the object of the change was to conform the taxation of business corporations to that authorized by Congress for the taxation of national banks. Whether under recent federal statutes, states are authorized to impose a tax upon the income from United States Bonds held by national banks, we need not stop to inquire. Certainly there is no statute of the United States which undertakes to authorize a state to impose a tax upon such bonds held by other kinds of corporations And what power Congress has under the Constitution in respect to such authorization we need not now determine. It is clear that authority, even if given, to impose a tax on federal bonds in the case of national banks does not include, by implication or otherwise, the authority to impose a tax upon such bonds held by ordinary corporations.
>
> "It is also suggested in that connection that the amendment in question is necessary, and that its real object was to avoid discrimination forbidden by federal statutes against national banks. But it is enough to say that if such discrimination would otherwise result it must be avoided by some method which does not involve the imposition of a tax which uniformly

for a century has been condemned by this Court as unconstitutional. The state may not save itself from infringing an Act of Congress by violating the Constitution."

It will be noted that in this case the Court did not pass on the validity of the assessment as against national banks. The national banks were not before the Court contesting the tax. The Court there simply held that even though the assessment against national banks was valid, that the State, under the peculiar circumstances of the taxing policy of the State, could not by its amendment include in the measure of the tax as against other corporations, for the privilege of doing business in that State, interest derived from such bonds.

After the decision in the above case, Massachusetts amended its tax Act as against other corporations in order to make the rate against such corporations correspond to the rate assessed against national banks. But notwithstanding such opinion, the State of Massachusetts did not change its mode of assessment against national banks, but did then, and does now, assess such banks in accordance with Method No. 4 authorized by Congress, and does assess said banks on their entire net income derived from all sources, including interest derived from the governmental securities.

This case, however, can no longer be considered as a controlling authority, as its affect was practically destroyed, if not entirely overruled in the later case of *Pacific Company* v. *Johnson*, 285 U. S. 480. This case has

heretofore been cited in this brief, but we here call the Court's attention to that portion of the opinion which we contend clearly distinguishes it from the *Macallen* case, *supra*.

The Court, in discussing a California statute similar to the Massachusetts statute, in the Macallen case, at page 494, says:

> "But it is said that the ruling of this Court in *Macallen Co.* v. *Massachusetts, supra*, requires the condemnation of the present tax. There the Commonwealth, which had long imposed a tax on corporate franchises measured by taxable income of the corporation, amended its statutes so as to add the income from tax-exempt bonds of the federal government to the measure of the tax. It was held that this change of taxation policy, embodied in the statute and 'adopted as though it had been so declared in precise words for the very purpose of subjecting these securities *pro tanto* to the burden of the tax,' was invalid. Thus the legislative abandonment of a policy which had previously discriminated in favor of tax-exempt securities was treated as a discrimination against them, and the tax, although in fact non-discriminatory, was condemned as analogous to the discriminatory tax held invalid in the Miller case. See *Macallen Co.* v. *Massachusetts, supra*, pp. 630, 631.
>
> "But the State of California, in its legislation, has indulged in no reversal of policy so far as the measurement of the franchise tax is concerned and in no discrimination either in favor of or against tax-exempt income. The entire history of its legislation discloses only that it has sought, in good faith, to conform its scheme of taxation of corporations to a permitted

method of taxing national banks, to avoid discrimination against the latter. It has effected its purpose by adopting, in a single legislative act, a new form of privilege tax on corporations measured by their net income without any form of discrimination as to the sources of the income included in the measure differing in this respect in no material way from the similar tax upheld in *Flint* v. *Stone Tracy Co.*, and in *Educational Films Corp.* v. *Ward, supra.* We should hesitate to say that any action of the legislature or any purpose disclosed by a state commission could restrict the power of the state by constitutional amendment to authorize a tax which admittedly it could have authorized without them. In any case, the use of words in the statute and report, indicating what would otherwise have been implied, that 'income' includes income from tax-exempt bonds, could neither enlarge the exemption nor diminish the constitutional power of the state.

"But we do not rest our decision upon any narrow distinction as to the precise form of words which may be employed in taxing statutes or the particular order in which its provisions are incorporated in the statute, whether by a single legislative act or by amendment or the addition of new provisions in successive re-enactments. A taxing statute, like others, must be read as a whole, as it stands on the statute books at its applicable date, and the legislative purpose in enacting it must be taken, regardless of forms of words, to envisage the obvious consequences which flow from its operation. Since the mere intent of the legislature to do that which the Constitution permits cannot deprive legislation of its constitutional validity, and the purposeful choice by the state of a method of taxation which appellant's contract allows, cannot alter the terms of the contract the present act must be judged by its

operation rather than by the motives which inspired it. As it operates to measure the tax on the corporate franchise by the entire net income of the corporation, without any discrimination between income which is exempt and that which is not, there is no infringement of any constitutional immunity."

It will also be noted that in this case, the Court did not pass upon the validity of the assessment of national banks under the California Act. California also adopted Method No. 4 of assessing national banks. While, as stated, the Supreme Court did not pass upon the validity of such assessment, as applied to national banks, we submit that no one can read the opinion in that case without arriving at the conclusion that if the assessment against national banks had there been challenged, the Court would have sustained the tax, just as it did sustain the right of the State of California in assessing a privilege tax against other corporations to include in the measure of the tax interest derived from governmental securities.

The Johnson case was followed by this Court in a *per curiam* opinion in the case of *People* v. *Lynch*, 290 U. S. 601.

The State of Oklahoma is in the same position that California was at the time it adopted its act assessing national banks in accordance with Method No. 4. Oklahoma did not change its policy of taxing other corporations. Oklahoma has always, and does now tax other corporations, for the privilege of doing business in the State, an excise tax which includes in the measure of the tax govern-

mental instrumentalities. (See Stipulation, Tr. 26.) Oklahoma simply did as California did—amended its tax Act, electing Method No. 4 under which to tax national banks. This method was authorized by Congress under the 1926 Amendment, and it certainly cannot be said, simply because the State elected to tax banks by that method, that its act, because of such election, is unconstitutional. If this contention of counsel is correct, then no state, which once elected to tax national banks under any other method except Method No. 4, could ever thereafter change to Method No. 4. Such contention is wholly untenable. Nothing that is said by the Supreme Court in the *Macallen* case, *supra* (even though that case may still be considered as authority for any purpose) can be construed as tending to so hold. We scarcely believe that such contention will be given serious consideration by this Court.

The case of *Miller* v. *Milwaukee*, 272 U. S. 713, is also cited. That case, however, was distinguished by this Court in the *Johnson* case, *supra*, wherein it was said:

> "The view that a tax, although levied on a taxable subject, may be deemed invalid because purposely devised to include a non-taxable subject in its measure, receives only a limited and qualified support from *Miller* v. *Milwaukee, supra*. There a state statute taxing corporate dividends was framed in such manner as to tax them only so far as they were derived from corporate income from tax-exempt bonds of the United States. The taxing act thus, on its face, did more than exhibit an intention of the one sovereignty to include in the dividends taxed, those derived from income from a non-taxable instrumentality of the other, together with income from all other sources. That admittedly would have been permissible; see *Des Moines National Bank* v.

Fairweather, supra; Flint v. *Stone Tracy Co., supra; Educational Films Corp.* v. *Ward, supra.* But it was the exclusion from the measure of the tax of all income except from federal bonds which rendered the tax invalid.

* * * * * * * * *

"But the present case is not one of discrimination. There is no attempt, as in *Miller* v. *Milwaukee, supra,* to measure the tax by exempt income while excluding from the measure all taxable income. The state seeks to do only what its contract permits it to do, to measure the franchise tax by all the net income of the taxpayer. If the words 'net income' in the taxing statute may rightly be taken to include income from tax-exempt bonds, as they were in *Flint* v. *Stone Tracy Co., supra,* then there can be no tenable ground for saying that the addition of the words 'income * * * includes * * * all interest received from federal, state, municipal or other bonds,' discloses any different purpose on the part of the Legislature, or can have any different effect, or can more definitely infringe the exemption than did the tax upheld in *Flint* v. *Stone Tracy Co., supra;* or that in *Educational Films Corp.* v. *Ward, supra.*"

We submit that the above authorities do not sustain counsel's contention.

The acts under which the bonds were issued do not prohibit the assessment of the tax here involved. The act levying the tax does not, therefore, impair the obligation of appellant's contract.

Counsel urge that the Acts of Congress under which the various bonds herein involved were issued exempt them from taxation, and that the tax here laid is in violation of such provisions and, therefore, impairs the obligation of appellant's contract.

In support of this contention counsel cite the case of *District of Columbia* v. *Briggs National Bank*, 30 Fed. (2d) 873. In that case the District of Columbia, by the Act of 1902, as amended by the Act of 1917, taxed national banks on a certain per cent of their gross receipts, and included in the measure of such tax interest derived from government bonds. Under a later Act other bonds were issued, and that Act provided that such bonds should be exempted from all taxation, except estate or inheritance taxes imposed by authority of the United States or its possessions, or by any State or local taxing authority. The District sought to tax these bonds under the provisions of said Act of 1902, as amended in 1917. The Court held the latter Act superseded that Act, and that the District of Columbia could not, in assessing national banks, include in the measure of the tax gross income derived from such bonds.

The gist of the above statute is stated in the opinion as follows:

"Paragraph 5 of the Act of Congress of July 1, 1902, 32. Stat. 619, provides in brief that each national bank in the District shall on or before August 1st of each year make return to the board of personal tax appraisers of the amount of its gross earnings for the preceding year ending the 30th day of June, and shall pay to the collector of taxes 6 per cent per annum on such gross earnings. It also provides that in addition thereto the real estate owned by each national bank shall be taxed as other real estate in the District of Columbia. By an amendment of 1917 (39 Stat. 1047) it was provided that the tax levied on gross earnings should be in lieu of all other taxation upon the personal property of the bank."

It will be noted that the statute in that case omits the all-important words contained in Section 5219, authorizing assessments against national banks, that such banks may be assessed under Method No. 4 on their entire net income derived from all sources. The words "entire income from all sources" are excluded from the 1902 Act under which national banks in the District of Columbia were assessed.

We have always conceded, and now concede, that prior to the 1926 Amendment authorizing the states to include in the measure of the tax, when electing to tax under Method No. 4, the entire net income derived from all sources, that the State was without power to in any manner reach, in assessment against national banks, income derived from Governmental securities, but as before stated, the Amendment was expressly adopted for the purpose of permitting the State to include in the measure of the tax

such income. Moreover, the Act in the above case authorized the assessment on gross earnings. It has always been held by the Supreme Court and other courts that in assessing taxes for the privilege of doing business in a state, a state, measuring the tax by net income, might include in the measure thereof net income derived from Governmental securities, but that it could not include in the measure of such tax gross income. This distinction is clearly pointed out in the case of *Northwestern Mutual Life Insurance Co.* v. *Wisconsin*, 275 U. S. 136, 72 L. ed. 202, cited in the above opinion. In that case the Court, after holding that the tax in that case was not strictly a privilege tax, further said, in 72 L. ed. 206:

> "Section 76.34 undertakes to impose a charge not measured by dividends paid, as in *Home Ins. Co.* v. *New York, supra*, nor by net income as in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 55 L. ed. 389, 31 Sup. Ct Rep. 342, Ann. Cas. 1912B, 1312; and those cases are not controlling. The distinction between an imposition, the amount of which depends upon dividends or net receipts, and one measured by gross returns is clear. *United States Glue Co.* v. *Oak Creek*, 247 U. S. 321, 328, 62 L. ed. 1135, 1141, 38 Sup. Ct. Rep. 499, Ann. Cas. 1918E, 148, and earlier opinions there cited."

Reverting to the opinion of the Court in the *Briggs National Bank* case, *supra*, we call the Court's attention to the following language used in disposing of the issues there involved:

> "The controlling point in the decision of the court in this case is that a *license, franchise, or privilege tax, measured by gross income, gross earnings, or gross*

*receipts, which are partly derived from United States bonds, amounts to taxation on the bonds themselves and it was for this reason that the court held that the state exceeded its power and that the tax was to that extent void. The District tax law is not different from the law of Wisconsin, as set out in the opinion of the court in the second Wisconsin case. * * *"*

It will be observed that in that case the tax was assessed upon the gross earnings of the bank. It was contended in that case that the gross earnings tax was a tax assessed for the privilege of doing business within the District, and that the inclusion of such gross earnings in the measure of the tax did not operate to assess a direct tax against the bonds. The Court denied that contention, but based its denial mainly upon the proposition that the tax was levied upon gross receipts and not upon net income. It is there again pointed out that it has always been held that a tax, even though called a privilege tax, measured by gross receipts was, and amounted to, a direct tax upon a governmental instrumentality and, in effect, a property tax, and therefore could not be considered a tax for the privilege of doing business.

It must be borne in mind in this case that the State is not here seeking to levy a tax upon gross receipts or gross earnings derived from governmental securities, nor is it seeking to levy a property tax directly against the bonds, nor to levy a direct income tax against the interest derived from such bonds, nor a tax against its franchise, but is simply seeking to assess a tax against national banks for the privilege of doing business within this State and

measuring such tax by the net income derived from all sources, as it is authorized to do by Congress.

The Court simply held in this case that, since, gross earnings and not net income constituted the measure of the tax, the Act did not operate to assess a privilege tax against the bank, but operated to assess a direct property tax against its bonds, and that the interest derived from the bonds involved in that action could not be taxed because exempted by the Act under which the bonds were issued.

This case does not in any manner sustain the contention of appellant, but rather leads to the contrary conclusion. The inference is, that if the Act had provided that national banks situated in the District of Columbia might be assessed a tax, measured by net income including income derived from Government bonds, the Court would have construed the tax as a privilege tax and permitted the inclusion of the interest derived from these bonds to be considered in the measure thereof.

The appellant in the instant case is certainly in no better position, in relation to the bonds here involved, than any other corporation which might have possession of such bonds, or any portion thereof. It certainly would not be contended that in assessing a privilege tax against such corporation that the State could not include in the measure of the tax capital invested by such corporation in such bonds. This being true, the same rule is applicable in assessing a privilege tax against national banks.

There is attached to the stipulation "Exhibit-D" (Tr. 39), which contains a schedule of the kind and character of bonds involved in this action. They consist of:

Federal Farm Mortgage Corporation Bonds,
U. S. Treasury Notes,
U. S. Treasury Bonds,
Joint Stock Land Bank Bonds,
Home Owners' Loan Corporation Bonds,
Federal Land Bank Bonds.

The Federal Land Bank Bonds and Joint Stock Land Bank Bonds were issued under the provisions of the Act of July 17, 1916, as amended, 39 Stat. at Large 380.

The Section insofar as exemption from taxation is concerned will be found in Volume 4, Fed. Code, Title 12, Sec. 931 (39 Stat. at Large 380). This Section provides:

> "Every Federal land bank and every national farm loan association, including the capital and reserve or surplus therein and the income derived therefrom, shall be exempted from Federal, State, municipal, and local taxation, except taxation upon real estate held, purchased, or taken by said bank or association under the provisions of section 11 and section 13 of this Act. First mortgages executed to Federal land banks, or to joint-stock land banks, and farm loan bonds issued under the provisions of this Act, shall be deemed and held to be instrumentalities of the Government of the United States, and as such they and the income therefrom shall be exempt from Federal, State, municipal, and local taxation."

The exemption as to Federal Farm Corporation Bonds will be found in Title 12, Fed. Code 1020f, subdivision (b) (48 Stat. at Large 360), and is as follows:

"Mortgages executed to the Land Bank Commissioner and mortgages held by the corporation, and the credit instruments secured thereby, and bonds issued by the corporation under the provisions of this Act, shall be deemed and held to be instrumentalities of the Government of the United States, and as such they and the income derived therefrom shall be exempt from Federal, State, municipal and local taxation (except surtaxes, estate, inheritance and gift taxes)."

The Act under which the Home Owners' Loan Corporation Bonds were issued contains somewhat similar exemptions, and will be found in 4 Fed. Code, Title 12, Sec. 1463e (49 Stat. at Large 296). The Acts authorizing the issuance of the U. S. Treasury Notes and U. S. Treasury Bonds contain like exemptions. It is our contention that the tax-exemption provisions of these various Acts are not broad enough to preclude the State from assessing a privilege tax against national banks, for the privilege of doing business, and including in the measure thereof interest derived from such bonds, as the assessment is specifically authorized by special Act of Congress. The Acts authorizing the issuance of these bonds certainly do not repeal Section 5219, U. S. Revised Statutes, as amended.

As before stated, neither the bonds nor the interest derived therefrom are taxed, and no assessment against the bonds or the interest has been made by the Tax Commission. The Commission has simply assessed a privilege tax against the bank for the privilege of doing business in this State.

This theory and contention, we think, are clearly sustained by the Supreme Court of the United States in the case of *Pacific Co., Ltd.*, v. *Johnson*, 285 U. S. 480. It is there said:

> "A California corporation acquired municipal bonds at a time when, by the state constitution, they were declared to be 'free and exempt from taxation.' Subsequently, pursuant to a change in the constitution, a statute subjected the corporation to a tax on the privilege of doing business in the State, measured by a specified percentage of its net income, in the computation of which the statute directed the inclusion of 'all interest received from federal, state, municipal or other bonds.' *Held* (assuming that the exemption was contractual and extended to the income derived from the bonds exempted):
>
> "1. That the tax immunity granted was not broad enough to secure freedom from taxation of the corporate franchise measured by the tax-exempt income, and therefore, the obligation of the bond contracts was not impaired by the tax."

The tax herein laid is not within the scope of the exemptions granted by the various Acts under which these bonds were issued. This contention, we think, is further sustained by the case of *Hale* v. *State Board of Assessment and Review*, 302 U. S. 95. The gist of the decision in that case is stated in paragraphs 2 and 5 of the headnotes, as follows:

> "Iowa legislation, in effect when state and municipal bonds were issued and acquired, declared that such bonds should not be taxed. Later, a tax on the net income of residents in the State was imposed for the

first time, and income taxes were assessed to the bondholders, the interest derived from their bonds being included in the computation of net income. The state court assumed without deciding that the statutes of exemption should be treated as giving rise to contracts, but interpreted those statutes as limited to taxes laid directly upon property in proportion to its value, and not as touching taxes in the nature of an excise upon the net income of the owner. This Court follows the state court's conclusion, finding that at the least it is not plainly wrong and that it has support (a) in the State's statutory system of taxation viewed in its entirety (p. 101), (b) in decisions of Iowa and other States before the bonds were bought and afterwards (p. 103), and (c) in decisions of this Court, p. 104.

* * * * * * * * *

"The tax complained of in this case is not laid upon the obligation to pay the principal or the interest, at all events not within the meaning of the contract of exemption; but is laid upon the yield, if any, of an aggregate of occupations and investments. P. 107. 271 N. W. 168, affirmed."

In that case the State of Iowa sought to levy an income tax on interest derived from State and municipal bonds. At the time these bonds were issued, under the statute of that State, they were expressly exempted from taxation. Thereafter the State of Iowa passed its Income Tax Act and specifically provided that the interest from state and municipal bonds should be subject to the tax. The taxpayer contended that such Act impaired the obligation of its contract. The Supreme Court of Iowa denied that contention and on appeal this Court affirmed the

judgment and held that the tax assessed under the Income Tax Act was not within the scope of the original exemption granted.

To the same effect is the case of *Flint* v. *Stone Tracy Co.*, 220 U. S. 108. In discussing a question similar to the one here involved, beginning at page 164, the Court said:

> "In *Home Ins. Co.* v. *New York*, 134 U. S. 594, a tax was sustained upon the right or privilege of the Home Insurance Company to be a corporation, and to do business within the State in a corporate capacity, the tax being measured by the extent of the dividends of the corporation in the current year upon the capital stock. Although a very large amount, nearly two of three millions of capital stock was invested in bonds of the United States, *expressly exempted from taxation by a statute of the United States*, the tax was sustained as a mode of measurement of a privilege tax which it was within the lawful authority of the State to impose. Mr. Justice Field, who delivered the opinion of the court, reviewed the previous cases in this court, holding that the State could not tax or burden the operation of the Constitution and of laws enacted by the Congress to carry into execution the powers vested in the General Government. Yielding full assent to those cases, Mr. Justice Field said of the tax then under consideration: 'It is not a tax in terms upon the capital stock of the company, *nor upon any bonds of the United States composing a part of that stock.* The statute designates it a tax upon the "corporate franchise or business" of the company, and reference is only made to its capital stock and dividends for the purpose of determining the amount of the tax to be exacted each year.' In that case, in the course of the opinion, previous cases of

this court were cited, with approval, *Society for Savings* v. *Coite*, 6 Wall. 594; *Provident Institution* v. *Massachusetts*, 6 Wall. 611.

"In the Coite case a privilege tax upon the total amount of deposits in a savings bank was sustained, although $500,000 of the deposits had been invested in securities of the United States, *and declared by the act of Congress to be exempt from taxation by state authority*. In that case the court said: 'Nothing can be more certain in legal decision than that the privileges and franchises of a private corporation, and all trades and avocations by which the citizens acquire a livelihood, may be taxed by a State for the support of the state government. Authority to that effect resides in the State independently of the Federal Government, and is wholly unaffected by the fact that the corporation or individual has or has not made investment in Federal securities.' In *Provident Institution* v. *Massachusetts*, *supra*, a like tax was sustained.

"It is therefore well settled by the decisions of this court that when the sovereign authority has exercised the right to tax a legitimate subject of taxation as an exercise of a franchise or privilege, it is no objection that the measure of taxation is found in the income produced in part from property which of itself considered is nontaxable. Applying that doctrine to this case, the measure of taxation being the income of the corporation *from all sources*, as that is but the measure of a privilege tax within the lawful authority of Congress to impose, it is no valid objection that this measure includes, in part at least, property which as such could not be directly taxed. See in this connection *Maine* v. *Grand Trunk Ry. Co.*, 142 U. S. 217, as interpreted in *Galveston, Harrisburg & San Antonio Ry. Co.* v. *Texas*, 210 U. S. 217, 226."

The Supreme Court of this State, in the case of *First National Bank of El Reno* v. *Oklahoma Tax Commission*, 185 Okla. 98, 90 Pac. (2d) 438, in construing the section of the Act here involved, construed the same as levying a franchise tax for the purpose of doing business in the State, measured by net income, just as have the taxing Acts involved in the above cases been construed by this Court. It is there said:

> "The statute herein involved (sec. 16, art. 6, chap. 66, S. L. 1935) was enacted pursuant to specific authority granted by Congress which authorized the levy of a tax 'according to or measured by the entire net income (received) from all sources.' It was, no doubt, contemplated that income derived from tax-exempt securities would be included.
>
> "The power of the state to levy a franchise tax measured by net property or income, including tax-exempt bonds of the United States, or their income, has been upheld by the Supreme Court of the United States in a long line of decisions. The state act and the permissive federal act involved herein clearly indicate that such a tax was contemplated and levied; therefore, under the authorities, no state or federal constitutional provision has been contravened by this taxing statute."

What is said by this Court in the above cases applies with equal force to the case at bar. The immunity granted by the Acts in question is not broad enough to secure freedom from taxation of the privilege tax assessed against appellant, measured by the tax-exempt income, and, therefore, such income is properly and legally and constitutionally included in the measure of the tax.

Counsel, in order to sustain their contention relative to the proposition here discussed, also rely on *Macallen* v. *Massachusetts, supra.* That case, however is not applicable to the facts in this case. In that case the State of Massachusetts enacted a statute levying a license tax against corporations for the privilege of doing business within the State, measured by net income. The Act expressly provided for an exemption of income derived from State, municipal and governmental securities. Thereafter the State amended its Act and expressly provided that in measuring the tax, interest derived from such securities should be included in the measure of the tax. This Court held that the Act did not apply to income derived from securities issued prior to the amendment; that the inclusion of such interest in the measure of the tax impaired the obligation of the contract as to such securities.

This case is not at all applicable here. At the time the securities in question were issued, there was no Act of the State expressly prohibiting the State, in assessing a franchise or privilege tax, from including therein income derived from such securities. Moreover, this case is clearly distinguished by this Court in the *Johnson* case, *supra*, and what is said in the Johnson case applies here.

The cases relied upon by counsel are, therefore, not controlling.

Counsel further contend that the Act assesses an income tax on income derived from the bonds in question, and that such tax is prohibited by the Acts under which

the bonds were issued. In this connection they call attention to the fact that the Supreme Court of the State, in construing a prior tax Act, held that the tax assessed against national banks thereunder was an income tax.

The case of *Board of County Commissioners of Oklahoma County* v. *State Board of Equalization*, 155 Okla. 183, 8 Pac. (2d) 732, is cited. It is there said:

> "Under article 7, chap. 66, Sess. Laws 1931, banks and banking corporations are classified for the purpose of taxation, and a tax laid on the net income of said banks."

It will be noted in that case that the Court was construing the Act of 1931, under which the State elected to assess national banks in accordance with Method No. 3, which authorized the states to assess national banks on their net income. Under that Act the Court correctly held that the tax assessed was an income tax. However, the law was revised in 1935, and under that Act the State elected to assess national banks in accordance with Method No. 4, authorized by Congress, that is, according to or measured by net income.

The Supreme Court, in construing the Act, specifically held in the case of *First National Bank of El Reno* v. *Oklahoma Tax Commission*, *supra*, that the tax assessed thereunder was a franchise tax measured by net income. The decision in the instant case was based on that case. It will, therefore, be seen that there is no decision of the Supreme Court of the State holding that the present tax,

and the tax here involved, against national banks is an income tax.

We submit that the authorities amply sustain the Supreme Court in its conclusions as to the nature of the tax. We further submit that the tax laid is in all respects valid and that the judgment of the Supreme Court of the State so holding is correct and should be affirmed.

Respectfully submitted,

F. M. DUDLEY,
Attorney for Appellee,
State Capitol Building,
Oklahoma City, Oklahoma.

A. L. HERR,
C. D. STINCHECUM,
Of Counsel,
State Capitol Building,
Oklahoma City, Oklahoma.

SUPREME COURT OF THE UNITED STATES.

No. 596.—October Term, 1939.

Tradesmens National Bank of Oklahoma City, a Banking Corporation, Appellant, vs. The Oklahoma Tax Commission.	Appeal from the Supreme Court of the State of Oklahoma.

[March 25, 1940.]

Mr. Justice Murphy delivered the opinion of the Court.

This is an appeal under § 237 of the Judicial Code from a judgment of the Supreme Court of Oklahoma, denying recovery of taxes alleged to have been exacted from appellant, a national banking corporation, in violation of the provisions of R. S. 5219 and the Constitution of the United States.

Section 16 of the Oklahoma Income Tax Law of 1935 [S. L. 1935, c. 66, art. 6][1] lays a tax upon every national banking association, located or doing business within the state "according to, or measured by, its net income" at the rate of six per centum. Section 17 provides for a similar tax upon state banks and Morris Plan Companies.

The net income used as the measure of the tax under §§ 16 and 17 is determined by subtracting from gross income, as defined in § 18, certain deductions allowed by § 9. Section 18 defines gross

[1] The text of Section 16 reads as follows:

(a) In lieu of the tax imposed by Section 6, every national banking association located or doing business within the limits of the State of Oklahoma, shall annually, pay to this State, a tax according to, or measured by, its net income, to be computed in the manner hereinafter provided, at the following rates upon the basis of its entire net income for the next preceding fiscal or calendar year:

Six (6%) per centum of the amount of the net income as herein provided.

(b) The State of Oklahoma is hereby adopting method numbered (4), authorized by Section 5219, U. S. Revised Statutes, as amended. The tax imposed by this Section shall be exclusive and in lieu of all taxes imposed by the State of Oklahoma, or any subdivision thereof, on the property of any association liable to tax hereunder; provided, that nothing in this Section shall be construed to exempt the real property of national banking associations from taxation to the same extent, according to its value, as other real property is taxed.

income for the purposes of "national banking associations, state banks, trust companies and other financial corporations" [§ 8(c)]. It specifically includes in gross income "interest upon the obligations of the United States, or its possessions, or upon securities issued under the authority of an Act of Congress the income from which is tax free."

All other types of corporations are taxed at the flat rate of six per centum upon the net income allocable to business transacted within the state [§6]. Net income for this purpose is determined by making certain specified deductions from gross income [§§ 7, 9], which is defined expressly so as to exclude interest on tax-immune federal securities [§ 8(b)(4)].

The appellee Oklahoma Tax Commission, in assessing appellant's tax for the year 1936 under § 16, included in gross income the dividends received by appellant on stock owned by it in a federal reserve bank and the interest received on bonds and notes issued pursuant to acts of Congress declaring the income from such securities tax exempt.[2] The present suit was brought by appellant to recover that portion of the tax, paid under protest, which resulted from including such dividends and interest in the computation.

R. S. 5219, 12 U. S. C. § 548, copied in the margin,[3] authorizes four alternative methods whereby a state may impose a tax on

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[2] The stipulation of facts shows that the interest used in the computation of the tax was derived from the following types of securities: U. S. Treasury Notes; U. S. Treasury Bonds; Bonds of the Federal Farm Loan Act; Joint Stock Land Bank Bonds; Home Owners' Loan Corporation Bonds; and Federal Land Bank Bonds.

[3] The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with:

1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause.

. . . . . .

(c) In case of a tax on or according to or measured by the net income of an association, the taxing State may, except in case of a tax on net income, include the entire net income received from all sources, but the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon mercantile, manufacturing, and business corporations doing business within its limits:

. . . . . .

3. Nothing herein shall be construed to exempt the real property of associations from taxation in any State or in any subdivision thereof, to the same extent, according to its value, as other real property is taxed.

national banking associations located within its limits. Method numbered (4) provides for a tax on such associations "according to, or measured by" "the entire net income received from all sources" subject only to certain restrictions as to the rate. This method was added to the three previously authorized under R. S. 5219 by an amendment of March 25, 1926 [c. 88, 44 Stat. 228]. The plain meaning of the amendment is confirmed by its legislative history showing beyond doubt that Congress intended to authorize a franchise tax measured by net income including interest on tax-immune federal securities.[4]

Oklahoma in the 1935 act expressly followed and adopted the method thus authorized in the amendment. See *First National Bank* v. *Oklahoma Tax Commission*, 185 Okla. 98, 90 P. (2nd) 438. Subsection (b) of § 16 expressly declares that the state thereby adopts method numbered (4) authorized by R. S. 5219, 12 U. S. C. § 548.

The power of Congress to authorize a state to impose a tax on the franchise of a national banking association can not now be doubted. *Van Allen* v. *Assessors*, 3 Wall. 573. Compare *Keifer & Keifer* v. *R.F.C.*, 306 U. S. 381, 389; *Helvering* v. *Gerhardt*, 304 U. S. 405, 411-412n; *Federal Land Bank* v. *Priddy*, 295 U. S. 229, 234-235. Any immunity attaching to the franchise by virtue of R. S. 5219 as it read prior to the 1926 amendment, compare *Pittman* v. *Home Owners' Corp.*, 308 U. S. 21, could be withdrawn by Congress and the franchise subjected to state taxing power, just as national bank shares were so subjected by the Act of June 3, 1864. *Van Allen* v. *Assessors*, 3 Wall. 573. See *Des Moines National Bank* v. *Fairweather*, 263 U. S. 103; *Peoples National Bank* v. *Board of Equalization*, 260 U. S. 702.

The power of a state to levy a tax on a legitimate subject, such as a franchise, measured by net assets or net income including tax-exempt federal instrumentalities or their income is likewise well settled. *Society for Savings* v. *Coite*, 6 Wall. 594; *Provident Institution* v. *Massachusetts*, 6 Wall. 611; *Home Insurance Company* v. *New York*; 134 U. S. 594; *Educational Films Corp.* v. *Ward*, 282 U. S. 379. Thus state laws taxing the shareholders of national

[4] 67 Cong. Rec. 5760-5762, 5822-5823, 6082-6089.

banks in accordance with R. S. 5219 on the full net value of their shares, although the banks owned tax-exempt federal securities, have been consistently upheld. *Des Moines National Bank* v. *Fairweather*, 263 U. S. 103; *Peoples National Bank* v. *Board of Equalization*, 260 U. S. 702; *Van Allen* v. *Assessors*, 3 Wall. 573. The rule that a tax upon a legitimate subject, measured by net income, including that from tax-immune federal instrumentalities, is not an infringement of the immunity, was affirmed in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 147, 165, and followed in *Educational Films Corp.* v. *Ward*, 282 U. S. 379. Compare *Pacific Co.* v. *Johnson*, 285 U. S. 490. The tax-immunity conferred on the securities owned by appellant has not been shown to be any greater in extent than that conferred on the federal securities included in the measure of the taxes sustained in the cited cases.

Sections 16 and 17 of the 1933 act were for present purposes identical with the corresponding sections of the 1935 act, but § 18 of the prior act contained a provision expressly excluding from gross income the interest on tax-immune federal securities.

Appellant contends that the act of 1935, by expressly including in the measure of the tax the interest on federal securities which before had been expressly excluded from the measure, must be regarded not as a valid franchise tax but as an unconstitutional levy on the tax-immune income itself. In support of its position, its main reliance is placed upon our decision in *Macallen* v. *Massachusetts*, 279 U. S. 620.

A similar contention was urged against the California franchise tax measured by net income, including tax-exempt income on state bonds, which was upheld in *Pacific Co.* v. *Johnson*, 285 U. S. 480. In rejecting the claim, the holding in the *Macallen* case was referred to as follows (285 U. S. at 494): "There the Commonwealth, which had long imposed a tax on corporate franchises measured by taxable income of the corporation, amended its statutes so as to add the income from tax-exempt bonds of the federal government to the measure of the tax. It was held that this change of taxation policy, embodied in the statute and 'adopted as though it had been so declared in precise words for the very purpose of subjecting these securities *pro tanto* to the burden of the tax,' was invalid. Thus the legislative abandonment of a policy which had

previously discriminated in favor of tax-exempt securities was treated as a discrimination against them, and the tax, although in fact non-discriminatory, was condemned as analogous to the discriminatory tax held invalid in the *Miller* case [*Miller* v. *Milwaukee*, 272 U. S. 713]." See also *Educational Films Corp.* v. *Ward*, 282 U. S. 379, 392-393.

It cannot be said that the Oklahoma tax in question here was aimed at tax-exempt federal securities in the manner thus disclosed and condemned in the *Macallen* case. The history of the Oklahoma legislation on this subject discloses only that it sought to change its policy pursuant to the express authorization conferred by R. S. 5219. It has effected its purpose by including within the measure of its franchise tax on national banks the entire net income without respect to source and without discrimination against tax-exempt federal securities. See *First National Bank* v. *Oklahoma Tax Commission*, 185 Okla. 98, 90 P. (2nd) 438.

We do not now decide just what circumstances, if any, would bring a situation within the precise scope of the *Macallen* case, assuming that case still has vitality. It is sufficient to hold, as we do, that the statute in the instant case merits the test stated in *Pacific Co.* v. *Johnson*, viz: "Since the mere intent of the legislature to do that which the Constitution permits cannot deprive legislation of its constitutional validity, . . . the present act must be judged by its operation rather than by the motives which inspired it. As it operates to measure the tax on the corporate franchise by the entire net income of the corporation, without any discrimination between income which is exempt and that which is not, there is no infringement of any constitutional immunity."

Appellant finally contends that the tax here in question violates the restriction in R. S. 5219 that "the rate shall not be higher than . . . the highest of the rates . . . assessed upon mercantile, manufacturing, and business corporations doing business" within the state.[5]

A consideration of the course of judicial decision on R. S. 5219 and its predecessors can leave no doubt that the various restrictions

[5] No claim is made that state financial institutions receive more favorable treatment than national banking associations. Sections 17, 18 and 8(c) show that the tax imposed on such state institutions is the equivalent of the tax levied by § 16 on national banks.

it places on the permitted methods of taxation are designed to prohibit only those systems of state taxation which discriminate in practical operation against national banking associations or their shareholders as a class. Compare *First National Bank* v. *Hartford*, 273 U. S. 548; *Amoskeag Savings Bank* v. *Purdy*, 231 U. S. 375; *Covington* v. *First National Bank*, 198 U. S. 100; *Lionberger* v. *Rouse*, 9 Wall. 468. Thus it is not a valid objection to a tax on national bank shares that other moneyed capital in the state or shares of state banks are taxed at a different rate or assessed by a different method unless it appears that the difference in treatment results in fact in a discrimination unfavorable to the holders of the shares of national banks. *Amoskeag Savings Bank* v. *Purdy*, 231 U. S. 375; *Covington* v. *First National Bank*, 198 U. S. 100.[6] We think the same purpose to prevent actual discrimination but to allow the states considerable freedom in working out an equitable tax system is discernable in the particular restriction upon which appellant relies.

The resolution of the issue raised by appellant thus turns upon an examination of the whole tax structure of the state. Counsel have stipulated that six thousand business and mercantile corporations, in addition to paying the income tax imposed by § 6 on six per centum of their net income, filed a corporation license tax return for the year 1936 and paid a tax based on one dollar per one thousand dollars of the value of the capital stock employed within the state, and that the Government bonds held by each were included as capital in the measure of the franchise tax. They further stipulated that only thirty-seven of these six thousand corporations owned Government bonds and that, in the case of all but three, the franchise taxes paid exceeded the additional amounts which would have been due under the income tax imposed by § 6 had their gross income, contrary to the fact, included the interest derived from the bonds. In addition to the foregoing taxes, so it is stipulated, each of these corporations paid an ad valorem tax on its moneyed capital.

This brief survey suffices to show that, considering all the taxes imposed upon business and mercantile corporations doing business

[6] See also Davenport Bank v. Davenport Board of Equalization, 123 U. S. 83; Mercantile Bank v. New York, 121 U. S. 138; Des Moines v. Fairweather, 263 U. S. 103.

in the state, the scheme of taxation adopted by Oklahoma does not discriminate against national banking associations. Discrimination is not shown merely because a few individual corporations, out of a class of several thousand which ordinarily bear the same or a heavier tax burden, may sustain a lighter tax than that imposed on national banking associations. Compare *Amoskeag Savings Bank* v. *Purdy*, 231 U. S. 373, at 393; *Lionberger* v. *Rouse*, 9 Wall. 468. Judged in the light of the established policy of Congress with respect to this subject, the 1935 Oklahoma taxing statute cannot be held to violate the provisions of R. S. 5219.

The other contentions advanced by appellant have been considered and found to be without substance.

Affirmed.

Mr. Justice McREYNOLDS took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.